



REPUBLIC OF KENYA



**Muraguri & another v SA (Minor Suing Through Father and Next Friend RM) & another (Civil Suit E214 of 2021) [2025] KEHC 13111 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 13111 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL SUIT E214 OF 2021  
DO CHEPKWONY, J  
JANUARY 30, 2025**

**BETWEEN**

**ERIC MURAGURI ..... 1<sup>ST</sup> APPELLANT**

**BERNARD NDEGWA HUNDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SA (MINOR SUING THROUGH FATHER AND NEXT FRIEND  
RM) ..... 1<sup>ST</sup> RESPONDENT**

**KUEHNE & NAGEL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a ruling in respect of a Notice of Motion application dated 9<sup>th</sup> August, 2024 which was filed under Certificate of Urgency seeking the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to order a stay of execution of the proclamation, warrants of attachment and warrants of sale of property issued to the Applicants by Eshikoni Auctioneers dated 5<sup>th</sup> July, 2024.
  - d. That this Honourable Court be pleased to allow the Applicants to pay the pending balance of Kshs. 2,000,000/= due to the Respondents herein within 30 days.
  - e. Spent.
  - f. That Eshikoni Auctioneers be directed to tax their costs.
  - g. That the costs of this application be in the cause.



2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Janerose Nanjira sworn on 6<sup>th</sup> February, 2024. According to the Applicant, Judgment in the trial court was delivered for the sum of Kshs 3,658,305/= in favour of the Respondent, whereby they lodged the present appeal against it and deposited a sum of Kshs. 1,000,000/= as a condition for stay of execution, which sum has since been released to the Respondents. The Applicants hold that the Respondents have obtained a Proclamation and Warrants dated 5<sup>th</sup> July, 2024 claiming the entire decretal sum without factoring in the sum of Kshs 1,000,000/= and thus they face unfair execution proceedings. It is their contention that they are ready and willing to deposit the balance of Kshs. 2,000,000/= within thirty (30) days and thus seek stay of execution to enable them process the payment. They have urged that it would be in the interest of justice that the orders sought are granted.
3. The Application was opposed through a Replying affidavit of Victor Ayieko as the Advocate for the 1<sup>st</sup> Respondent sworn on 1<sup>st</sup> October, 2024 where he states that the application is a mere delay tactic meant to deny the 1<sup>st</sup> Respondent the fruits of her Judgment. He avers that the Applicants have not given cogent reasons why they deserve the orders sought and contends that under prayer No.(4), the Applicants have sought thirty (30) days to pay the balance of the decretal sum yet time has lapsed with no further payments made. The 1<sup>st</sup> Respondent argues that the Applicants have not met the legal threshold for stay of execution orders to issue and thus the application ought to be dismissed with costs to the 1<sup>st</sup> Respondent.
4. The 1<sup>st</sup> Respondent similarly filed submissions dated 25<sup>th</sup> October, 2024 holding that the Applicant has not fulfilled the three conditions set out under Order 42 Rule 6 of the Civil Procedure Rules in that he has not demonstrated substantial loss and the unreasonable delay. According to him, Judgment was delivered on 12<sup>th</sup> October, 2021 and the appeal was dismissed for want of prosecution on 11<sup>th</sup> December, 2023. That the present application was made eight (8) months later when the process of execution had already commenced and no explanation on the reasons for the delay have been provided and neither has security been offered for due performance of the decree, thus the application is ripe for dismissal.

### **Analysis and Determination**

5. In considering the application dated 9<sup>th</sup> August, 2024, I have read through the Supporting Affidavit, Replying Affidavit alongside written submissions filed by either party and find the main issues for determination being:-
  - a. Whether an order of stay of execution of the Proclamation, Warrants of Attachment and sale of property can issue.
  - b. Whether the Applicants can be allowed to pay the balance of Kshs.2,000,000/= to the Respondent.
6. The law on stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules as follows:-

“No order for stay of execution shall be made under sub rule (1) unless—

  - a. the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and



- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”
7. On the purpose of an application for stay of execution pending appeal the court in *RWW v EKW* [2019] eKLR, held:-
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
8. It is trite law that for a court to grant stay of execution, three conditions must be met:
- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss
- c. The Applicant has offered security for due performance of the decree.
9. On the first condition, the Judgment herein was delivered on 12<sup>th</sup> October, 2021 and the appeal dismissed for want of prosecution on 11<sup>th</sup> October, 2023 whereby the sum of Kshs. 1,000,000/= which, was deposited as security in court ordered released to the Respondent. The present application was filed on 9<sup>th</sup> August, 2024, which as correctly submitted by the Respondent, is more than eight (8) months later and no explanation has been given for the delay hence this condition has not been fulfilled.
10. On the second condition of substantial loss, the applicant has only stated that they are likely to suffer substantial loss since the 1<sup>st</sup> Respondents has already taken out Warrants of Proclamation and execution. But as stated by the 1<sup>st</sup> Respondent, he was justified to commence the execution process which is a lawful process and thus the Applicants cannot claim substantial loss. The court in the case of *Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another* [1986] eKLR held that:-
- “Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”
11. The court agrees with the case of *Kenya Shell supra* that without the evidence of the substantial loss it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its Judgment. According to the Applicant, if the Respondent is let to execute the Judgment and decree, it will be to the detriment of the Applicant’s who stand to suffer irreparable damage and loss. The Respondents on the other hand submitted that the application is a means of denying the 1<sup>st</sup> Respondent fruits of litigation this being a Road Traffic Accident case.
12. Lastly, is the issue of security for the due performance, wherein the Applicant has requested the court to allow them a thirty (30) days period to pay the Respondent a balance of Kshs.2,000,000/=, which its Insurer is ready, willing and able to pay to finance the process. On its part, the Respondent have responded that the issue of security was discussed in the case of *Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd* [2019] eKLR, where it was held:-
- “... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from



money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his Judgment in case the appeal fails...”

13. In this Court’s view, although the Appellants/Applicants have indicated that their Insurer intends to pay the balance of Kshs.2,000,000/= within thirty (30) days, there is no evidence from the said Insurer to confirm this. It has further been pointed out by the Respondent that the substantive appeal was already dismissed by the court for want of prosecution and this Court notes that there is no appeal in existence for any orders to issue hence the application is found lacking in merit and is therefore dismissed with costs to the Respondents.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Ayieko counsel for 1<sup>st</sup> Respondent

Court Assistant - Martin

